Legal Update

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The Appeals Court holds that a driver's nervous demeanor when stopped by police for speeding, the failure of the motor vehicle's rental contract to list the driver's name as an authorized operator, and the very strong smell of unburned marijuana within the vehicle did not combine to establish probable cause to search the vehicle for marijuana.

Commonwealth v. Andrew K. Locke (and a companion case), Mass. Appeals Court, No. 15-P-552/15-P-553 (2016):

Facts: State police stopped a minivan after they observed it driving erratically and speeding while approaching the tollbooth on Route 84. As the trooper approached the passenger side of the vehicle, he did not see any furtive movements, he did not observe anyone attempt to flee, and he noticed the windows of the minivan were tinted and had interior shades that were pulled down. When the trooper spoke to the driver through an open window, he immediately detected an odor of unburned marijuana. The defendant, Andrew Locke, was in the driver's seat. He appeared nervous, his chest was heaving, and he talked excessively while the passenger started straight ahead. The defendant gave police an Arizona driver's license and a rental contract in the name of "Robert Spinks." The rental contract indicated that the minivan had been rented two days earlier in Rhode Island and the defendant explained the contract was in his uncle's name. The defendant

claimed he borrowed the minivan so he could visit his daughter in Boston. It was unclear if the defendant was authorized to drive the minivan.

The trooper also noticed several air fresheners in the minivan in various locations and was aware that air fresheners were often used to mask the odor of narcotics in a vehicle. Due to safety concerns, the trooper ordered the defendant out of the vehicle and sat in him the backseat of the cruiser, without handcuffs. When asked whether he had marijuana on him, the defendant stated that he was not in possession of marijuana, but that he and the passenger had smoked some earlier in the day. At this point, the trooper called for a drug detection dog. The trooper also questioned the passenger, who informed police he was from Arizona as well, although he did not have identification on his person. The passenger denied both that there was an odor of marijuana coming from the minivan and that he had smoked marijuana earlier with the defendant. The passenger was ordered out of the minivan as well. Both the defendant and the passenger were subjected to a pat frisk. No marijuana or contraband was found. However, the defendant did have $3,500.00 cash on his person.

The drug detection dog alerted police to the rear gate of the minivan. Police opened the gate and found 159 pounds of marijuana in the back of the minivan. The defendant and passenger were arrested and charged with Trafficking in marijuana pursuant to G.L. c. 94C, § 32E(a), and Conspiracy to Traffic in marijuana pursuant to G.L. c. 94C, § 40. The defendants filed a motion to suppress. The Commonwealth appealed from the allowance of the defendants' motion to suppress evidence.

Conclusion: The Appeals Court affirmed the allowance of the motion to suppress, finding that the exit order was unlawful and that the strong odor of unburnt marijuana did not provide the police with probable cause to search the minivan.

Although the initial stop of the minivan was valid due to the erratic operation of the minivan and speeding, the Court determined that the exit order and pat frisk were not lawful. To support an order to exit a vehicle, the officer need only point to some fact or facts in the totality of the circumstances that would create a "reasonable suspicion of danger" that would warrant an objectively reasonable officer to secure the scene in a more effective manner by ordering the occupants out of the vehicle. ***Commonwealth v. Feyenord***, 445 Mass. 72, 75-76 (2005), cert. denied, 546 U.S. 1187 (2006). See ***Commonwealth v. Cardoso***, 46 Mass. App. Ct. 901, 902 (1998) (fidgeting around and avoiding eye contact were not enough to order operator out of car).

The defendant's nervousness did not justify the exit order. See ***Commonwealth v. Cruz,*** 459 Mass. 459, 468 (2011) (nervousness is common during mundane encounters with police and is "not necessarily indicative of criminality"); ***Commonwealth v.***

Douglas, 472 Mass. 439, 445 (2015) (staring straight ahead did not give rise to reasonable suspicion). Here, the troopers did not observe any furtive movements, weapons, contraband, or other activity to suggest that there was criminal activity or danger to the officers or others. With regard to the status of the defendant's license, there was nothing in the record to indicate it was invalid. Likewise, the record did not support the conclusion that "the fact that the minivan was a rental vehicle but that the defendant's name was not on the contract would, or could, without more," result in his arrest. Once the defendant produced his license, the vehicle registration, and the rental agreement, the defendants should have been permitted to leave.

The Commonwealth argued that there are several considerations in combination that support a reasonable belief that there was criminal activity: the odor of marijuana, the presence of air fresheners, and the nervousness of the defendants warrant a reasonable suspicion of criminal conduct alone or together. The Court wrote that it was "constrained to affirm" the allowance of the motion due to prior case law.

Lastly, the Court considered the strong odor of unburned marijuana and held that "the odor of unburnt, rather than burnt, marijuana could be more consistent with the presence of larger quantities, . . . it does not follow that such an odor reliably predicts the presence of a criminal amount of the substance, that is, more than one ounce, as would be necessary to constitute probable cause." ***Commonwealth v. Overmyer***, 469 Mass. 16, 21 (2014). The Commonwealth contended that, although the judge correctly characterized the Supreme Judicial Court's holding regarding the conclusions that may be drawn from the odor of marijuana, in this case there was more than the mere odor of marijuana. "The Supreme Judicial Court's decisions rest on the idea that one cannot reliably determine weight from smell alone. It is undeniably true that precise quantity cannot ordinarily be determined by one's nose. But that is not the same as concluding that relative quantity cannot be determined through smell, at least to the level of reasonable suspicion or probable cause. Here, the smell of marijuana was 'very strong' and that should have been enough to support a reasonable suspicion, or probable cause, that a criminal amount of marijuana was present." Unfortunately, the Court found that the "two observations, insufficient alone, do not, in these circumstances, add up to probable cause to search the minivan under the automobile exception and the fact that the rental agreement was not in the name of the driver adds nothing to the equation." Furthermore, the lack of evidence to indicate the drug detection dog was trained to discern whether the marijuana weighed over of an ounce also failed to assist the Commonwealth's argument.